

United States District Court
Central District of California

GCIU-EMPLOYER RETIREMENT
FUND and BOARD OF TRUSTEES OF
THE GCIU-EMPLOYER RETIREMENT
FUND,

Plaintiffs,

v.

QUAD/GRAPHICS, INC.,

Defendant.

Case № 2:16-cv-00100-ODW (AFMx)

**ORDER GRANTING
DEFENDANT’S MOTION FOR
LEAVE TO TAKE DEPOSITION [94]
AND GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION FOR EARLY
CONSIDERATION OF MOTION IN
LIMINE [98]**

I. INTRODUCTION

Before the Court are Defendant Quad/Graphics, Inc.’s (“Quad”) motion for leave to take the deposition of David McCarthy and its motion for early consideration of a motion in limine or, in the alternative, for leave to take the deposition of three auditors identified by Plaintiffs GCIU-Employer Retirement Fund and Board of Trustees of the GCIU-Employer Retirement Fund (collectively “the Fund”). (ECF Nos. 94, 98.) For the reasons discussed below, the Court **GRANTS** Quad’s motion for leave to take McCarthy’s deposition, **DENIES** Quad’s request for early consideration of its motion in limine, and **GRANTS** Quad’s request for leave to take

1 the auditor depositions.¹

2 **II. BACKGROUND**

3 The Fund is a multiemployer pension plan within the meaning of the Employee
4 Retirement Income Security Act (“ERISA”). Quad was previously obligated to
5 contribute to the Fund on behalf of its employees. Quad allegedly failed to pay certain
6 contributions to the Fund, and thus the Fund filed this action to recover those
7 contributions. (ECF No. 1.) In August 2016, the Court issued a scheduling order,
8 wherein it set this matter for trial on June 6, 2017. (ECF No. 44.) After discovery
9 closed and the parties filed cross-motions for summary judgment, the Court vacated
10 the trial date. (ECF No. 92.) The Court subsequently issued an order granting the
11 Fund’s motion for partial summary judgment, denying Quad’s motion for summary
12 judgment, and resetting the trial date on the Fund’s delinquent contribution claim for
13 September 26, 2017. (ECF No. 93.) The Court did not reopen discovery. (*Id.*) One
14 week later, Quad moved for leave to take the deposition of its own witness, David
15 McCarthy, in order to preserve his testimony for trial. (ECF No. 94.) Quad also
16 moved for early consideration by the Court of a motion in limine to exclude evidence
17 of damages based on the Fund’s failure to disclose such evidence during discovery.
18 (ECF No. 98.) In the alternative, Quad seeks leave to depose three auditors
19 designated by the Fund to testify regarding damages. (*Id.*) Those motions are now
20 before the Court for consideration.

21 **III. DISCUSSION**

22 **A. Motion for Leave to Take Deposition**

23 Quad moves for leave to take the deposition of its own witness, David
24 McCarthy. Quad previously disclosed McCarthy as a potential witness and
25 designated him to testify regarding Quad’s obligation to contribute to the Fund under
26 various collectively bargaining agreements. McCarthy was prepared to testify in-

27 ¹ After considering the papers filed in connection with the motions, the Court deems them
28 appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15. The
Court therefore **VACATES** the hearing on these motions.

1 person at the previously-scheduled June 2017 trial; however, McCarthy was recently
2 diagnosed with cancer, and thus will be unable to testify in-person at the September
3 2017 trial. The Fund never deposed McCarthy before the discovery cutoff, and thus
4 Quad seeks to take his deposition to preserve his testimony for trial. The Court agrees
5 that this constitutes good cause to grant Quad leave to take his deposition.

6 A party must show “good cause” for relief from a deadline set in a scheduling
7 order, including the discovery cutoff. Fed. R. Civ. P. 16(b)(4); *Johnson v. Mammoth*
8 *Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992). “Rule 16(b)’s ‘good cause’
9 standard primarily considers the diligence of the party seeking the amendment. The
10 district court may modify the pretrial schedule ‘if it cannot reasonably be met despite
11 the diligence of the party seeking the extension.’” *Johnson*, 975 F.2d at 609 (quoting
12 Fed. R. Civ. P. 16 advisory committee’s notes (1983 amendment)). “[C]arelessness is
13 not compatible with a finding of diligence and offers no reason for a grant of relief.
14 Although the existence or degree of prejudice to the party opposing the modification
15 might supply additional reasons to deny a motion, the focus of the inquiry is upon the
16 moving party’s reasons for seeking modification. If that party was not diligent, the
17 inquiry should end.” *Id.* (citations omitted).

18 Here, there was no lack of diligence on Quad’s part. Quad disclosed McCarthy
19 as a witness during discovery and reasonably believed that he would be able to testify
20 at trial—and thus did not take his deposition. Quad could not have anticipated that the
21 Court would continue the trial to a date where McCarthy would be unavailable to
22 testify due to a serious medical condition. Thus, Quad has shown good cause to take
23 his deposition after the discovery cutoff.

24 The Fund contends that the Court should deny Quad’s motion because: (1)
25 Quad failed to meaningfully meet and confer with the Fund, in violation of Local Rule
26 7-3, regarding a stipulation on the substance of McCarthy’s testimony; and (2) his
27 testimony is likely irrelevant and/or duplicative and thus there is no “good cause” to
28 take his deposition. Neither argument warrants denying this motion. First, while the

1 parties have not yet reached a stipulation regarding the substance of McCarthy's
2 testimony, Quad states that it has met and conferred (and will continue to meet and
3 confer) with the Fund on this issue. If the parties do not reach an agreement, however,
4 the prudent course of conduct on Quad's part is to file this motion well in advance of
5 the pending trial date—as it does now. Under these circumstances, the Court finds
6 Quad's meet and confer efforts sufficient for the purposes of Local Rule 7-3. Second,
7 the "good cause" analysis simply requires Quad to demonstrate that it was not careless
8 in failing to take McCarthy's deposition earlier. *Johnson*, 975 F.2d at 609. Quad has
9 done that. Whether his testimony is ultimately irrelevant or duplicative is not
10 pertinent to a grant of relief under Rule 16(b)(4).² That said, the Court strongly
11 encourages the parties to stipulate to the substance of McCarthy's testimony where
12 possible. The failure to stipulate to obviously undisputed facts wastes both the
13 parties' and the Court's resources and may result in sanctions.

14 **B. Motion for Early Consideration of Motion in Limine**

15 Quad contends that the Court should exclude evidence of damages that the
16 Fund did not disclose during discovery. This includes four exhibits summarizing
17 Quad's outstanding contributions, and the testimony of three auditors to interpret
18 these exhibits and the underlying evidence. Quad also argues that the auditors are
19 giving expert testimony and thus the Fund's failure to produce an expert report on
20 their behalf precludes them from testifying at trial. Quad therefore moves for early
21 consideration of its motion in limine to preclude such evidence or, in the alternative,
22 for leave to take the depositions of the Fund's auditors.

23 The Court concludes that early consideration of Quad's contemplated motion in
24 limine is inappropriate. Exclusion of information, evidence, or witnesses at trial based
25

26 ² To the extent some other Rule or authority would bar his deposition based on relevance or the
27 duplicative nature of the testimony, the Fund fails to cite it and thus waives any such argument. *See*
28 *Heft v. Moore*, 351 F.3d 278, 285 (7th Cir. 2003) ("The failure to cite cases in support of an
argument waives the issue"); *United States v. Karl*, 264 F. App'x 550, 553 (9th Cir. 2008)
("Failure to cite to valid legal authority waives a claim.").

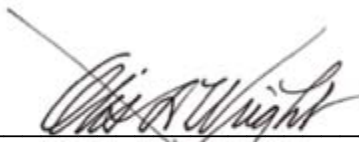
1 on a party's failure to comply with disclosure requirements is appropriate only where
2 "the failure was [not] substantially justified or is [not] harmless." Fed. R. Civ. P.
3 37(c)(1). Whether or not the failure is "harmless" depends in part on whether the
4 surprise or prejudice to the opposing party can reasonably be cured. *See, e.g., Allen v.*
5 *Similasan Corp.*, 306 F.R.D. 635, 640 (S.D. Cal. 2015). The possibility of cure is a
6 particularly important factor where, as here, excluding the evidence would deal a fatal
7 blow to a party's claims. *See R & R Sails, Inc. v. Ins. Co. of Penn.*, 673 F.3d 1240,
8 1247 (9th Cir. 2012). Here, there are almost four months before this matter proceeds
9 to trial, which is a substantial window for the parties to work together to cure any
10 surprise or prejudice caused by the Fund's belated disclosure. It is therefore
11 premature for the Court to exclude any evidence under Rule 37. As a result, the Court
12 must deny Quad's motion for early consideration of its motions in limine. However,
13 the Court grants Quad's request for leave to take the deposition of the Fund's three
14 auditors, to which the Fund does not object.

15 IV. CONCLUSION

16 For the reasons discussed above, the Court: (1) **GRANTS** Quad's motion for
17 leave to take the deposition of David McCarthy; (2) **DENIES** Quad's motion for early
18 consideration of its motion in limine; and (3) **GRANTS** Quad's motion for leave to
19 take the depositions of Kyle Whittemore, Carl Coates, and Patrick H. Lynch. (ECF
20 Nos. 94–98.)

21
22 **IT IS SO ORDERED.**

23
24 June 5, 2017

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27 **OTIS D. WRIGHT, II**
28 **UNITED STATES DISTRICT JUDGE**